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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 590

CHESAPEAKE & OHIO RAILWAY COMPANY, - - - - - - - Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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December 8, 1961.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

	PAGE
Petition for writ	1
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Reasons for granting the writ	8
Conclusion	11
Appendix A—Statutes	13
B—Opinions and judgment below	16

CITATIONS.

Cases:

	PAGE
Baltimore & O. R. Co. v. Alpha Portland Cement Co., 218 F. 2d 207 (CA 3 1955)	8, 9
Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F. 2d 902, 20 A.L.R. 2d 695 (CA 9 1950)	8, 9
Brown Hotel Company v. Pittsburgh Fuel Co., 311 Ky., 396, 224 S. W. 2d 165 (1949)	10
Coca-Cola Bottling Co. of Louisville v. Lowe, Ky., 275 S. W. 2d 47 (1955)	10
Gatliff Coal v. Cox, 142 F. 2d 876 (CCA 6 1944)	4, 20
Haskell Plumbing & Heating Co. v. Weeks, 237 F. 2d 263 (CA 9 1956)	8, 9
Kennedy v. Pennsylvania Railroad Co., 282 F. 2d 705 (CA 3 1960)	8, 9

PAGE

Lobel v. American Air Lines, 192 F. 2d 217 (CA 2 1951) 8, 9

Norman v. Southern Bell Telephone & Telegraph Company, Ky., 322 S. W. 2d 95 (1959) 4, 10

Pullman Co. v. Cincinnati, N. O. & T. P. Rwy., 147 Ky. 498, 144 S. W. 385 (1912) 10

Robert Lawrence Co., Inc. v. Devonshire Fabrics, 271 F. 2d 402 (CA 2 1959) 8, 9

Statutes:

Kentucky Revised Statutes, Chapter 417 ..... 4, 20

U. S. C., Title 9, Section 2, 3, 14 .....3, 4, 6, 10, 13, 20

U. S. C., Title 28, Federal Rules of Civil Procedure, Rules 26 and 33 .....2, 3, 13–15

U. S. C., Title 28, Section 1254 (1) 2

U. S. C., Title 28, Section 2201 4

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CHESAPEAKE & OHIO RAILWAY COMPANY, - *Petitioner,*

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the case entitled *Louisville & Nashville Railroad Company,* Plaintiff-Appellee, v. *Chesapeake & Ohio Railway Company,* Defendant-Appellant, on October 27, 1961.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court (57a-61a) is unreported and is printed in Appendix B hereto, *infra,* Page 16. The opinion of the Court of Appeals (immediately preceding Clerk's certificate at end of record) is not yet reported and is printed in Appendix B hereto, *infra,* page 21.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 27, 1961, and is printed in Appendix B hereto, *infra*, page 24. The jurisdiction of this court is invoked under U.S.C., Title 28, Section 1254 (1).

QUESTIONS PRESENTED.

1. Should the controversy between the parties have been submitted to arbitration and not tried?

2. Should the District Court and the Court of Appeals have followed a change in the Kentucky common law of arbitration which resulted from a decision of the Kentucky Court of Appeals rendered after the institution of this action in the District Court?

3. The case having been tried, notwithstanding the contention that it should have been arbitrated, should not the plaintiff's claim have been dismissed as a matter of law?

4. Did not the lower courts erroneously construe Rules 26 and 33 of the Federal Rules of Civil Procedure in allowing plaintiff to read to the jury a self-serving portion of its answer to an interrogatory propounded by defendant?

5. Are not the trial court's instructions to the jury so erroneous in failing to charge on the distinction between primary and secondary negligence and between intervening and superseding cause and in injecting an instruction on the last clear chance as to invalidate the verdict returned thereon?

STATUTES INVOLVED.

The statutory provisions involved are sections 2, 3, and 14 of the United States Arbitration Act (U.S.C., title 9, sections 2, 3, and 14) and Rules 26 and 33 of the Federal Rules of Civil Procedure (U.S.C., title 28, Federal Rules of Civil Procedure, Rules 26 and 33). They are printed in Appendix A, *infra*, page 13.

STATEMENT.

In 1955, a passenger train of the Chesapeake & Ohio Railway Company (hereafter called C&O), which was operated on tracks of the Louisville & Nashville Railroad Company (hereafter called L&N) collided with an automobile at a grade crossing killing three passengers in the automobile and injuring two other passengers and the driver.

The companies settled all of the injury and death claims of the occupants of the automobile. The companies could not agree between themselves as to which company was at fault in causing the accident and how to apportion the sums spent to settle the claims. The C&O sought to settle these claims by arbitration. Its operating contract with the L&N provided for arbitration of disagreements. The L&N declined to arbitrate.

The L&N, a Kentucky corporation, invoked the jurisdiction of the District Court in filing an action for indemnity against the C&O, a Virginia corporation, on the ground of diversity of citizenship. The L&N

sought to recover the amount it had expended as its portion of the settlement. The C&O counterclaimed for indemnity or contribution. The L&N also sought a declaration of rights under the operating contract pursuant to the provisions of U.S.C., Title 28, Section 2201.

It was admitted that the operating contract was one evidencing a transaction involving commerce. Accordingly, the C&O made application to the court to stay the trial of the action until arbitration had been had in accordance with the terms of the contract. This it did pursuant to Section 3 of the United States Arbitration Act.

The District Court overruled the C&O's application for a stay and granted the L&N an injunction prohibiting the C&O from proceeding to arbitration.

At that time (July 16, 1958), the C&O conceded that under the Kentucky Arbitration Act (Kentucky Revised Statutes, Chapter 417) and the then Kentucky decision law, the arbitration clause of the contract was unenforceable under Kentucky law, as distinguished from the Federal Arbitration Act.

On March 13, 1959, the Kentucky Court of Appeals decided *Norman* v. *Southern Bell Telephone & Telegraph Company,* Ky., 322 S. W. 2d 95. There the Court expressly refused to follow the old rule that an arbitration agreement is unenforceable as an attempt to oust courts of jurisdiction. It declined to follow *Gatliff Coal Co.* v. *Cox,* 142 F. 2d 876 (CCA 6 1944), upon which the trial Court had relied in declining the C&O's application for a stay. Since that decision, the

C&O has contended, both in the District Court and in the Court of Appeals, that the arbitration clause is enforceable not only because of the provisions of the Federal Arbitration Act but under Kentucky decision law.

The dispute between the parties as to whose fault the accident was grew out of the fact that, at the time of the accident, in connection with the operation of the nearby L & N stone quarry, the L&N had caused its solely owned railroad cars to stand on a siding in such a way that the closest car was only 22 feet from the edge of the siding. Because of the closeness to the crossing of this car on the siding, it was impossible for the driver of the automobile, which was involved in the collision, to see the approaching C&O train on the main track until the train was only 94 feet from the crossing.

Without the cars on the siding, it would have been possible for the motorist to see the approaching train when it was more than 1,300 feet from the crossing.

The contract provided that, should damage result from the negligence of the C&O, the C&O would hold the L&N harmless should the L&N be sued on account of such damages. It provided that should damage result from the negligence of the L&N, the L&N would hold the C&O harmless should the C&O be sued on account of such damages. It further provided that should damage result from the joint negligence of the L&N and the C&O the damage should be equally borne by them. In case the L&N and C&O could not agree as to whose train or employees was or were at fault,

the differences were to be referred to arbitration (13a-15a).

The original contract between the L&N and C&O was made in 1895. Because Section 14 of the Federal Arbitration Act provides that it shall not apply to contracts made prior to January 1, 1926, the original contract would not be within the provisions of the act. However, the L&N and C&O exchanged letters about the contract in 1948-1949 (26a-40a). It is the C&O's contention that the effect of this correspondence was to alter, extend, and modify the original contract, thus to renew it as of 1948-1949, and therefore to make the contract as modified a post-January 1, 1926, contract, bringing it within the provisions of the Federal Arbitration Act.

The crossing where the accident happened was marked by a standard railroad crossing sign but was not otherwise protected. No watchman or automatic warning signals, such as crossing gates or flashing lights, protected travelers using the crossing.

The movement of the railroad cars on the siding, which resulted in reducing a motorist's view of an approaching train from more than 1,300 feet to only 94 feet, took place on the day before the accident.

The L&N contended that the presence of its cars on the siding so close to the crossing rendered it unusually dangerous and therefore put the burden upon the C&O to operate its train over the crossing at a reduced speed. It contended that, because the engineer of the C&O train had had opportunity on his inbound trip on the morning of the day of the accident to ob-

serve the close proximity of the cars to the crossing, the C&O was at fault in operating its train over the crossing at 48 miles an hour on its outbound trip on the afternoon the accident happened.

At this speed, it required some 1,100 feet to stop the train, and the engine crew of the train were unable to see the approaching motorist until the engine was within 300 feet of the crossing.

The C&O contended that, even if its engineer knew of the dangerous condition, and it steadfastly denied that he did know of it, any negligence on his part in failing to slow his train before reaching the crossing was but secondary negligence. It contended that the L&N's allowing the closest car on the siding to be within 22 feet of it, when the L&N's own operating rules required it to be not less than 50 feet from it, and in failing to take some extraordinary precaution to protect travelers using the crossing, such as stationing a watchman there or issuing an order for all trains to reduce speed when using the crossing, was primary negligence.

The trial court overruled the C&O's motion for a directed verdict made at the close of the plaintiff's evidence, at the close of all the evidence, and renewed during the jury's deliberations. The trial court declined the C&O's request to instruct the jury on the distinction between primary and secondary negligence and between intervening and superseding cause and, over the C&O's objection that no such issue was involved, instructed the jury on the doctrine of last clear chance.

The jury returned a verdict that the accident was all the fault of the C&O, and the C&O appealed a judgment entered on the verdict to the Court of Appeals, which affirmed the judgment.

REASONS FOR GRANTING THE WRIT.

1. The decision of the District Court and affirmed by the Court of Appeals with respect to the arbitration issue is in conflict with the decision of the Court of Appeals for the Second Circuit in *Robert Lawrence Co., Inc.* v. *Devonshire Fabrics*, 271 F. 2d 402 (CA2 1959), certiorari granted 362 U. S. 909, but dismissed pursuant to Rule 60, 364 U. S. 801. The decision of the courts below with respect to the indemnity and contribution issues is in conflict with the decisions of the Court of Appeals for the Third Circuit in *Baltimore & O. R. Co.* v. *Alpha Portland Cement Co.*, 218 F. 2d 207 (CA3 1955) and *Kennedy* v. *Pennsylvania Railroad Co.*, 282 F. 2d 705 (CA 3 1960) and with the decision of the Ninth Circuit in *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 902, 20 A.L.R. 2d 695 (CA 9 1950). The decision of the courts below with respect to plaintiff's reading in its own behalf a self-serving answer to one of defendant's interrogatories is in conflict with the decision of the Court of Appeals for the Second Circuit in *Lobel* v. *American Air Lines*, 192 F. 2d 217 (CA 2 1951) and the decision of the Ninth Circuit in *Haskell Plumbing & Heating Co.* v. *Weeks*, 237 F. 2d 263 (CA 9 1956).

In the *Robert Lawrence* case, the Second Circuit held that:

> "[A]ny doubts as to the construction of the [Federal Arbitration] Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars. Such policy has been consistently reiterated by the Federal Courts and we think it deserves to be heartily endorsed." (271 F. 2d at 409.)

Contrasted with this announced policy of a liberal interpretation of promoting arbitration, the District Court and the Court of Appeals have in this case resolved all doubts against arbitration and have very narrowly construed the Federal Arbitration Act.

In the *Alpha Portland* and *Kennedy* cases, the Third Circuit, and in the *Booth-Kelly* case, the Ninth Circuit, recognized and applied principles of primary and secondary negligence in deciding questions of indemnity and contribution arising under industrial side track agreements which are similar to the operating contract between the L&N and the C&O in this case. The District Court, however, in this case refused to apply these principles, and the Court of Appeals affirmed the refusal.

In the *Lobel* case, the Second Circuit, and in the *Haskell Plumbing* case, the Ninth Circuit refused to permit the party making self-serving answers to interrogatories propounded by the opposite party to read them. Here, the lower courts have condoned the

L&N's reading in its own behalf its self-serving answer to an interrogatory which the C&O propounded to it.

2. The decision of the courts below in holding that the arbitration clause of the contract is not enforceable under Kentucky common law is in conflict with the decision of the Kentucky Court of Appeals in *Norman* v. *Southern Bell Telephone & Telegraph Company*, Ky., 322 S. W. 2d 95 (1959), and the refusal of the lower courts to apply concepts of primary and secondary negligence to the determination of the question of indemnity and contribution is in conflict with the opinions of the Kentucky Court of Appeals in *Pullman Co.* v. *Cincinnati, N.O.&T.P. Ry.*, 147 Ky. 498, 144 S. W. 385 (1912); *Brown Hotel Company* v. *Pittsburgh Fuel Co.*, 311 Ky. 396, 224 S. W. 2d 165 (1949); and *Coca-Cola Bottling Co. of Louisville* v. *Lowe*, Ky., 275 S. W. 2d 47 (1955).

3. The lower courts have construed Section 14 of the Federal Arbitration Act to be a bar to the application of that act to the contract between the L&N and the C&O. The construction of this section of the Act has not been, but should be, settled by this court. The lower courts are believed to have erred in not construing the 1948-1949 correspondence between the L&N and the C&O to have been a renewal of their 1895 agreement and thus have erroneously failed to apply the Federal Arbitration Act.

4. The Court of Appeals sanctioned a departure by the District Court which is so far from the accepted and usual course of judicial proceedings as to

call for the exercise of this court's power of supervision.

The District Court refused to follow the principles of primary and secondary negligence as applicable to the question of indemnity and contribution as such principles are enunciated in the Kentucky decisions referred to in paragraph 2 above and in the Federal Courts of Appeals' decisions referred to in paragraph 1 above.

Instead of applying these principles, the District Court charged the jury on the nebulous concept of proximate cause, which confused the jury, as evidenced by their repeated requests for further instructions (117a-120a; 123a) and which confusion the court compounded by giving an unwarranted instruction on "last clear chance (119a)". The Court of Appeals dismissed the C&O's exception to all of this and approved of the trial court's actions by the brief observation that the instructions were adequate and accurate and that proximate cause was properly defined.

CONCLUSION.

For the foregoing reasons, the court should grant this petition for a writ of certiorari.

Respectfully submitted,

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